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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

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PRESIDENT'S MESSAGE

SCOTT M. PETERSON
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We're back! In mid-June members of the SCBA met, in person, for the first time in more than a year. Approximately fifty members enjoyed drinks, food and (gasp) conversation that did not take place over Zoom.

It was my honor to be sworn in as the President of SCBA for the upcoming year. I'll be joined this year by a wonderful slate of officers which includes Stuart Kaufman (VP), Shawn Lescault (Treasurer) and the Hon. Francine Vero (Secretary). A big thank you to Chris Mills, who guided the SCBA through the past year virtually, giving new meaning to the term "behind the scenes."

I first joined the Saratoga County Bar Association more than a decade ago, when I left a partnership position with an Albany firm to strike out on my own. Almost immediately I felt welcomed into the legal community, and over lunches, drinks and meetings I got to know many members of the Bar. Having been involved in other legal organizations over the years, I was very pleasantly surprised to see how welcoming the members of SCBA were.

As I see it, two of our most important roles as a Bar Association are to provide support for members and serve as a resource to our community. The "support" piece can come in many ways – whether providing CLE, assistance services or simply offering an opportunity for lawyers to come and have a conversation with a colleague. Many of us have at times (and in particular over the past year) experienced the isolation and stress that often comes with the practice of law, and the ability to reach out to a friend or colleague and talk can be extremely helpful.

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PRESIDENT'S MESSAGE

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In our community, I've come to appreciate just how many underserved folks there are out there. People who need help with housing, matrimonial, family or employment issues, but have little resources or access to information. Our Association is working to improve that, by implementing multiple programs to encourage pro bono assistance to veterans and members of the community at large.

As we emerge from the pandemic, the SCBA has an excellent opportunity to get back to supporting our colleagues and our community in ways that simply weren't possible over the past year, but that are more critical now than ever.

Stay tuned for more information about opportunities to meet with friends and colleagues, as well as how to get involved with some of our pro bono programs. I invite you to join us as we celebrate the return to "normalcy" and get back to doing the work of the SCBA.

THE PRACTICE PAGE

PUTTING REPLY PAPERS IN PERSPECTIVE

HON. MARK C. DILLON *

Reply papers are usually not the central focus of attorneys engaged in motion practice. The reason is obvious — that the parties' main evidence and arguments have already been placed before the court in the initial moving papers and opposition. This is not to say that reply papers do not have a valuable purpose. They can, and sometimes motions cannot be won without them.

Summary judgment motions have a special rule for replies. As is well known, the proponent of summary judgment on a cause of action or defense must tender evidence in admissible form establishing its *prima facie* entitlement to judgment as a matter of law. All of the qualifying evidence must be contained in the initial moving papers. The mission of the opposing party is to raise a question of fact requiring trial. Reply papers cannot be used to establish, for the first time, the party's *prima facie* burden of proof, as any failure to establish it cannot be cured by later reply submissions (*Vanderbilt Mortgage and Finance, Inc. v Ammon,* 179 AD3d 1138 [2d Dep't. 2020]; *American Transit Insurance Company v Longevity Medical Supply, Inc.*, 131 AD3d 841 [1st Dep't. 2015]). Reply papers are intended to voice a rebuttal to new issues raised in the opposition papers that immediately precede them, and should present new matter only to the extent of addressing the *opponent's* evidence or arguments (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380 [1st Dep't. 2006]; *Jones v Castlerick,* LLC, 128 AD3d 1153 [3rd Dep't. 2015]).

Parties opposing summary judgment, absent the filing of their own cross-motion, do not have the benefit of a sur-reply (CPLR 2214). However, the courts have discretion to permit a sur-reply that addresses an issue or evidence raised by the movant for the first time in reply (*Rolling Acres Developers, LLC v Montinat*, 166 AD3d 696 [2d Dep't. 2018]). Arguments raised by the movant in favor of summary judgment for the first time in reply, while technically improper, may still be considered by the court if it permits the opposing party a sur-reply to address them and which cures the defect (*Pizarro v Dennis James Boyle, Inc.*, 180 AD3d 596 [1st Dep't. 2020]).

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THE PRACTICE PAGE

PUTTING REPLY PAPERS IN PERSPECTIVE

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An opponent of summary judgment who makes a cross-motion for summary judgment is entitled under CPLR 2215 to submit a reply in further support of its cross-motion, but once again, all proof needed to meet the *prima facie* burden of proof must be tendered in the original cross-moving papers.

Reply papers may also be used to correct technical imperfections with the initial moving papers, regardless of the relief being sought. For instance, if a deposition transcript is submitted without a signature page and would be inadmissible, the signature page may be provided in reply to cure the defect (*Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2d Dep't. 2008]). Similarly, where a certificate of conformity is needed for the admissibility of an out-of-state affidavit in support of the initial motion, any defect with the certificate can be rectified in reply (*Olmeur Medical, P.C., Nationwide General Ins. Co.*, 41 Misc.3d 143[A] [App. Term 2d, 11th, 13th Jud. Dists.]). Where a foreign language witness submits an affidavit without a corresponding one from a translator, that defect may be cured with a translator's affidavit in reply (*Tavaras v Cayot Realty, Inc.*, 125 AD3d 754 [2d Dep't. 2015]). If the pleadings are not attached to the moving papers as required by CPLR 3212(b) for summary judgment, and the opposing party argues for the denial of the motion on that basis, the moving party may cure the defect by attaching the pleadings in reply (*Pandian v New York City Health and Hospitals Corporation*, 54 A.D.3d 590, 863 N.Y.S.2d 668 [1st Dep't. 2008]). In other words, as long as the *prima facie* evidence is submitted in the substance of the initial papers, admissibility or other technical defects may be corrected in the reply.

Attorneys should also be mindful of the time frames within which reply papers are due, as set forth in CPLR 2214(b) for motions and CPLR 2215 for cross-motions.

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*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ. of LEMIRE & HIGGINS, LLC

Failure to file proof of service vacates default judgment.

Miller Greenberg Mgt. Group, LLC v. Couture (Egan, J., 4/29/21)

The defendant was served with plaintiff's breach of contract action on November 20, 2017; after which plaintiff filed its affidavit of service with the Albany County Clerk. Defendant failed to answer or otherwise appear, leading to a default judgment in plaintiff's favor. Supreme Court (Hartman, J., Albany Co.) denied defendant's motion to vacate the default judgment but the Third Department reversed, concluding that plaintiff's filing of the affidavit of service was untimely (4 days later than the maximum 20 days permitted under CPLR § 308(2)); meaning that "service of process was never completed". The Appellate Division noted that while the failure to timely file a proof of service is not a jurisdictional defect, the procedural irregularity was not cured by court order, making this default a nullity because the defendant's time to answer never began to run.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Recalcitrant worker defense fails in Labor Law § 240(1) injury claim.

Bennett v. Savage (Garry, P.J., 3/4/21)

Plaintiff, standing on a wooden, A-frame ladder while insulating the defendant's building, felt the ladder move forward; causing him to fall and sustain injuries. Defendant, emphasizing plaintiff's testimony that the ladder was "sturdy" and positioned (by him) to prevent it from "wiggling", argued that plaintiff was a recalcitrant worker who acted recklessly. Supreme Court (Tait, J., Broome Co.) disagreed and granted plaintiff's motion for liability under Labor Law § 240(1), which the Appellate Division affirmed. Agreeing with the trial court that the plaintiff's deposition testimony was unclear whether he maintained a "three-point safety stance while on the ladder", the Third Department noted that even if that issue was decided in defendant's favor, evidence of a plaintiff's comparative negligence does not relieve a defendant of liability under Labor Law § 240(1).

Jury verdict for plaintiff in trip-and-fall action reversed.

Vnuk v. City of Albany (Colangelo, J., 2/4/21)

Plaintiff was hurt after tripping and falling over the footing of a traffic pole and signal that protruded from the sidewalk after the traffic signal had been removed. The defendant, which asked for the signal to be removed as a part of a private developer's hotel renovation project, moved for summary judgment on the ground that it did not receive prior written notice of the alleged defect – as required by the City Code. Supreme Court (Platkin, J., Albany Co.) denied the motion, and rejected the argument a second time when the City moved for judgment as a matter of law at the close of evidence during trial (which ended with a verdict for plaintiff). Reversing that judgment and dismissing the complaint, the Third Department found no proof that the defendant was on notice of the defect and further ruled that "the City's failure to inspect the sidewalk is an omission that does not constitute affirmative negligence that excuses compliance" with the City's written notice requirement (because non-inspection did not *immediately* cause the defective condition).

Summary judgment for all defendants in product liability action.

Lyall v. Justin Boot Co. (Aarons, J., 5/13/21)

Plaintiff's product liability action against the designer/manufacturer and retail seller of his work boots was filed after he was cut on the top of his foot when the chainsaw he was using to cut a tree kicked back and cut through the "vamp" (top) part of the boot. Supreme Court (Gilpatric, J., Ulster Co.) dismissed the complaint on defendants' motion for summary judgment, rejecting the plaintiff's argument that because the boots (by defendants' admission) lacked protection from chainsaw cuts, a question of fact was raised about whether the boots were reasonably safe and fit for their intended purpose. Affirming dismissal, the Third Department concluded the plaintiff did not rebut the defendants' showing that the applicable industry (design) standard did not require the boots to be cut-resistant, and that a separate claim of negligent misrepresentation alleged in the plaintiff's bill of particulars was not considered because it was not originally asserted in the complaint.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Ease of electronic discovery cited in disclosure dispute.

Rote v. Snyder (Reynolds Fitzgerald, J., 6/3/21)

Plaintiffs, hurt in a car-motorcycle crash on the road leading to the property hosting the annual Harley Rendezvous Classic, claimed the defendant property owner and rally organizers owed them a special duty of care to guard against dangers created by the heightened traffic that accompanies the event. Supreme Court (Slezak, J., Fulton Co.) granted plaintiffs' motion to compel discovery for information about crowd control, ticket sales, safety plans and minutes of meetings during which plans were made for the rally (for 2019 and the five preceding years). The Third Department, with one minor amendment, affirmed the trial court, specifically noting that "in the era of e-discovery, we do not classify what is being sought, as defendant does, as 'burdensome'". The Appellate Division also rejected the defendant's request that Supreme Court rule on the existence or lack of its duty to the plaintiffs as "an inappropriate undertaking by the court on a motion to compel discovery".

Questions of fact preclude summary dismissal.

Auto accident liability.

Johnson v. Freedman (Egan, J., 6/10/21)

In New York auto accident litigation, the emergency doctrine relieves a driver of liability if (s)he is "faced with an emergency situation, not of his or her own making, has little or no time to consider an alternative course of conduct" and acted reasonably under the circumstances. Here, the defendant taxi driver contended his passenger (plaintiff) was injured when the taxi was hit by an "out of control" vehicle that was sliding on snow and "going too fast" as it approached an intersection in Troy. But the second driver's testimony (corroborated by the plaintiff) described an initial impact between his car and a light pole, and "approximately five seconds went by" before the taxi struck the second vehicle. Affirming Supreme Court (Ryba, J., Albany Co.), the Appellate Division found summary judgment improper given the conflicting accounts about which vehicle struck the other first.

The "special employee" defense.

Leonard v. Wenz (Clark, J., 6/10/21)

The defendant construction contractor, sued by the plaintiff after she was struck by a sheetrock panel, claimed he was a "special employee" of the plaintiff's employer (Intertek) and therefore immune from suit under the exclusive remedy doctrine in New York Workers' Compensation Law §§ 11 and 29(6). Courts consider various factors in the "special employee" analysis, and although no single factor is determinative, particular significance is given to "who controls and directs the manner, details and ultimate result of the employee's work". Supreme Court (Tait, J., Cortland Co.) found conflicting evidence in considering the question, denied defendant's motion for summary judgment, and the Third Department affirmed.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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"Undisputed" medication error in emergency room.

Holland v. Cayuga Medical Center (Reynolds Fitzgerald, J., 6/17/21)

The defendant hospital did not dispute that its emergency room nurse administered too much "clot-busting" medication to the plaintiff whose CT scan showed she was having an ischemic brain stroke; but moved for summary judgment claiming a lack of proximate cause between the dosage error and any injuries suffered by the patient. Supreme Court (McBride, J., Tompkins Co.) denied the defendant's motion and the Third Department affirmed, citing to contrasting expert (neurology) opinions and the existence of triable issues of fact whether the plaintiff would have had a better outcome if she had been given the medication as prescribed by the attending physician.

"COMING TO AMERICA"

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

Does anyone even remember that movie? I never thought it was particularly good back in 1988 when it was released. It was on recently and I watched a few scenes. I don't think I really appreciated how talented Eddie Murphy and Arsenio Hall were, playing all the "other" characters apart from their own main characters. In any event, that's not what I really want to write about.

The title of the movie had me thinking recently how incredibly challenging it has become to "come to America" right now, particularly as we still are dealing with what I hope are the remnants of COVID-19. The amount of "delay" that is now baked into the overall immigration process as a result of COVID-19 is incredible (including a reported eight-fold increase in the consular immigrant visa backlog).[1] But I'm not really focusing on those delays, bad as they still are. No, what I am talking about now are delays which have occurred in the issuance of immigrant and nonimmigrant visas at our embassies and consulates around the world as a result of shutdowns, travel bans and so on.

A large part of the calls and emails that my staff and I field these days are questions asking when someone's family member will finally be scheduled for their immigrant visa interview, or their fiancé visa interview, or any interview that was postponed as a result of COVID. I'm also getting daily calls from employers whose employees are stuck outside the United States because they cannot get a new visa, or perhaps they are from or in a country where COVID-19 rates are high and, as a result, our government is not allowing them to return. Families and employers are feeling desperate.

In addition to pandemic-related delays, the Trump Administration spent pretty much its entire four years imposing travel bans targeting anyone and everyone, including those based on their faith, country of origin, whether they were smart enough, and even whether they were healthy enough. Although President Biden has rescinded some of Trump's handiwork,[2] he has not rescinded them all because of (his administration says) ongoing COVID-19 concerns, some of which I've mentioned above.

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1 See March 9, 2021 Foreign Press Center Briefing With Consular Affairs Acting Deputy Assistant Secretary for Visa Services, Julie M. Stufft on the Topic: Update on U.S. Immigrant Visa Processing at Embassies and Consulates, https://savediversityvisa.org/2021/03/10/update-on-u-s-immigrant-visa-processing-at-embassies-and-consulates/.

2 The Trump administration suspended entry of many immigrants and nonimmigrants, separate and apart from COVID-19. In addition, it imposed restrictions targeting certain countries and regions including China, Iran, Brazil, the Schengen Area, the U.K., Ireland, South Africa and India. There have also been many consular-related COVID-19 protocols that dramatically reduced the number of staff and services in many consular posts across the world.

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"COMING TO AMERICA"

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

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We need to get back up to speed, and fast. The ongoing travel bans and visa restrictions have had, and continue to have, significant consequences for individuals, families, and U.S. employers. The travel bans are keeping families separated. The travel bans are also impairing the ability of U.S. employers to bring in foreign talent, or bring back their own employees to the United States. The travel bans are also having a huge impact on seasonal employers and the positions they need to fill. All of this is preventing our nation from the economic recovery it desperately needs.

We need action now. A good starting point would be eliminating the travel bans that were enacted by the Trump Administration under the guise of stopping the spread of COVID and replacing them with common sense measures that are based on modern science. With the availability of vaccinations, all sorts of testing (including rapid testing), and the ability for countries to still quarantine if absolutely necessary, modern science can prevent the spread of COVID-19 (including all the scary variants). All the travel bans are doing is indiscriminately keeping certain individuals from "coming to America", which results in the continued separation of families, and employers from their employees.

As we come out on the other side of this global pandemic, it's time that our State Department ramp up its consular operations and that we, thoughtfully and strategically, reopen our borders. Candidly, the presidential proclamations imposing travel bans have been nothing more than confusing, adding ridiculous complexity because of new, complicated, and always changing national interest exemptions ("NIE") that are required so certain individuals can return to the U.S. sooner rather than later. It's too much for families and employers to deal with, and frankly it's just not necessary.

There are other things the government can do to ramp up consular operations and reopen our border,[3] even given the significant financial constraints it is under as a result of COVID-19, just as private business and industry adapted to their own unique circumstances over the last year. The time is now for our government to act.

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[3] For example, it can waive certain visa interviews (or do them virtually) so individuals need not go to an embassy or consulate in some circumstances; or it can extend certain visas for a defined period of time so individuals need not apply for new visas if they have to travel outside the U.S. or wish to come back. There are many other opportunities for our government to leverage the vast resources it has available to it.

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